



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Questioning Constitutional Pluralism

Citation for published version:

Mac Amhlaigh, C. 2011 'Questioning Constitutional Pluralism' University of Edinburgh School of Law Working Papers, no. 2011/17. <https://doi.org/10.2139/ssrn.1905053>

Digital Object Identifier (DOI):

[10.2139/ssrn.1905053](https://doi.org/10.2139/ssrn.1905053)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

© Mac Amhlaigh, C. (2011). Questioning Constitutional Pluralism. (University of Edinburgh School of Law Working Papers; 2011/17). 10.2139/ssrn.1905053

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



University of Edinburgh

School of Law

Working Paper Series

No 2011/17

Questioning Constitutional Pluralism

Cormac Mac Amhlaigh

Lecturer in Public Law

cormac.mac.amhlaigh@ed.ac.uk



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2011 Cormac Mac Amhlaigh

Edinburgh School of Law Working Paper Series

University of Edinburgh

Abstract

The contemporary legal landscape is one of a plurality of normative orders which exist alongside the conventional legal systems of states and public international law. That these systems interact and frequently conflict both with state law and international law and with each other is an increasingly common fact of modern legal practice. The concept of constitutionalism is frequently employed as a way of understanding these post-state regimes as well as a method of managing the inevitable conflicts between legal orders in a pluralist legal universe. In Europe, in particular, constitutionalism has featured prominently legal pluralist discourse in two important respects. Firstly, it has been employed as a way of theorizing non-state legal systems such as that of the European Union and the European Convention of Human Rights. Secondly, constitutionalism has been proposed as a frame within which to understand and manage legal pluralism in Europe and in particular as a framework for the resolution of conflicts between such orders. The received wisdom in this literature is that pluralism and conflicts between EU and national law are amenable to resolution according to a robustly constitutionalist framework whereas ECHR conflicts with national law are of a more radical pluralist form, and therefore less 'constitutionalist'. This paper challenges this orthodox position. It traces the genealogy of pluralism in the EU and ECHR orders, concluding that a pluralist conception of EU law cannot be constitutional due to the fact that conflicts between the EU and national law are contests of sovereignty, whose resolution in a constitutional frame is question-begging. The interaction between the ECHR and national legal systems, on the other hand, the paper argues, are precisely the sort of conflict where the concept of constitutionalism can do real work at the post-state level. In presenting this taxonomy as a better way of understanding normative pluralism in Europe, it concludes by introducing an argument against pluralism in the relationship between EU law and national law, arguing that the attitude of national courts such as the German Constitutional Court should be viewed as a form of institutional civil disobedience which is a normal aspect of any constitutional order, rather than requiring the positing of an overarching constitutional frame binding EU and national courts.

Keywords

Constitutionalism, pluralism, metaconstitutionalism, Grundnorm

Questioning Constitutional Pluralism

Dr. Cormac Mac Amhlaigh,

Edinburgh Law School,

cormac.mac.amhlaigh@ed.ac.uk

Abstract

The contemporary legal landscape is one of a plurality of normative orders which exist alongside the conventional legal systems of states and public international law. That these systems interact and frequently conflict both with state law and international law and with each other is an increasingly common fact of modern legal practice. The concept of constitutionalism is frequently employed as a way of understanding these post-state regimes as well as a method of managing the inevitable conflicts between legal orders in a pluralist legal universe. In Europe, in particular, constitutionalism has featured prominently legal pluralist discourse in two important respects. Firstly, it has been employed as a way of theorising non-state legal systems such as that of the European Union and the European Convention of Human Rights. Secondly, constitutionalism has been proposed as a frame within which to understand and manage legal pluralism in Europe and in particular as a framework for the resolution of conflicts between such orders. The the received wisdom in this literature is that pluralism and conflicts between EU and national law are amenable to resolution according to a robustly constitutionalist framework whereas ECHR conflicts with national law are of a more radical pluralist form, and therefore less 'constitutionalist'. This paper challenges this orthodox position. It traces the genealogy of pluralism in the EU and ECHR orders, concluding that a pluralist conception of EU law cannot be constitutional due to the fact that conflicts between the EU and national law are contests of sovereignty, whose resolution in a constitutional frame is question-begging. The interaction between the ECHR and national legal systems, on the other hand, the paper argues, are precisely the sort of conflict where the concept of constitutionalism can do real work at the post-state level. In presenting this taxonomy as a better way of understanding normative pluralism in Europe, it concludes by introducing an argument against pluralism in the relationship between EU law and national law, arguing that the attitude of national courts such as the German Constitutional Court should be viewed as a form of institutional civil disobedience which is a normal aspect of any constitutional order, rather than requiring the positing of an overarching constitutional frame binding EU and national courts.

Introduction

The proliferation of juris-generative sites at the post-state level in the post-war era regulating as diverse subjects as human rights, global trade, the internet and sport, has produced an array of legal systems existing alongside state legal systems and expanded the scope of traditional international law.¹ That these systems interact and frequently come into conflict is evidenced by the increase in high profile cases involving the application of more than one legal system, offering different potential outcomes to the dispute at hand.² Perhaps nowhere is this development more acute than in Europe, where the establishment of regional supranational courts overseeing regional agreements on human rights, trade and economic integration, impact and influence national legal systems to an unprecedented extent.³

In the European context, the law of European integration in particular entailing the free movement of the factors of production under the auspices of the European Union (EU),⁴ and particularly its ‘commerce clause’ equivalent⁵ have come into conflict with national constitutional provisions protecting fundamental rights. Similarly, the law of the European Convention on Human Rights (ECHR), and the European Court of Human Rights’ (ECtHR) interpretation thereof, have conflicted with both national understanding of analogous rights as well as had impact on a wide area of national policy which has met with resistance from national administrations.

For example, severe constitutional restrictions on abortion services (encapsulating prohibition on the dissemination of information outside the jurisdiction), have collided with rights to freedom of information and the free movement of services;⁶ the right to freedom of expression and assembly and constitutional protection of human dignity has conflicted with the free movement of goods,⁷ the implementation of global sanctions by the United Nations security council have conflicted with regional commitments to human rights both under the ECHR⁸ but also, latterly under the EU legal system;⁹ military operations in Iraq and Afghanistan have raised conflicts between differing regional human rights commitments and international humanitarian law¹⁰; all which speak to a veritable

¹ For an overview, see ‘Symposium: constitutionalism in an era of globalization and privatization’ (2008) 6(3-4) *International Journal of Constitutional Law*, 371-530.

² Examples include the conflicts between international human rights and humanitarian law which arose in *R (Al-Saadoon) v. Secretary of State for Defence* [2010] All E.R. 271 discussed in M. Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) *Duke Journal of Comparative and International Law*, 20, 69 and the law of the UN charter and EU law which arose in Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, Judgment of 3 September 2008.

³ Specifically the legal system of the (now) European Union originating in the in Rome Treaty of 1957 and the European Convention of Human Rights signed in 1950.

⁴ See now the Treaty on European Union and the Treaty on the Functioning of the European Union O.J. C/83 30.3.2010.

⁵ Article 30 of the Treaty of the Functioning of the European Union.

⁶ In the EU context, see Case 159/90, *SPUC v. Grogan* [1991] ECR I-4685, and the ECHR context *Open Door Counselling v. Ireland* A 246-A (1993); 15 EHRR 244 and Case No. 25579/05, *A, B & C v. Ireland*, Judgment 16 December 2010.

⁷ See cases C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

⁸ See App. No. 10593/08, *Nada v. Switzerland*. (Judgment Pending).

⁹ *Bosphorus Airways v. Ireland* 2005-VI; 42 EHRR 1; and *Kadi*, (2008) above.

¹⁰ *Al-Skieni v. UK* (no. 55721/07), judgment pending.

‘soup’ of normative orders engaging, interacting and conflicting in the attainment of their various, often incompatible, goals.

This mutual coexistence and sporadic conflict inevitably raise questions as to the precise nature and status of conflicting legal systems and, in particular, whether any sort of discipline can be imposed on this ‘disorder of orders’¹¹, and whether any priority can be established between them to facilitate adjudication before courts. In this regard, constitutionalism has become an increasingly popular method of characterising these non-state systems as well as providing a device to manage conflict by providing normative criteria against which courts can apply, or indeed *disapply*, the norms of one legal system as opposed to another.¹²

More specifically, the former sense, the idea is that certain of these post state legal regimes are *themselves* constitutional. Thus, the legal system of the EU with its claims to direct effect, primacy over national law and implied powers, has been generally understood to be making constitutional claims such that its legal order is more akin to a domestic rather than an international one.¹³ Similarly, the European Court of Human Rights has been described as a ‘constitutional court for Europe’,¹⁴ a claim which has been bolstered by the recent introduction of ‘pilot judgements’ to manage the large number of repeat litigation arriving at the Court.¹⁵

The second significant way in which constitutionalism has entered legal discourse regarding post-state legal regimes in Europe has been as a way of characterising conflict between regimes. Constitutional pluralism has been offered as a way of characterising normative conflict both in the sense of mutual acceptance between conflicting orders as to the constitutional status of the other, as well as by providing a ‘metaconstitutional’ framework within which to manage and resolve conflicts between the regimes.¹⁶ In this second sense, constitutionalism operates as a higher order frame resolving systemic conflict by providing an important *ordering* function in respect of the different legal orders but still somehow separate from, and external to, the orders themselves.

This importation of constitutionalism as a way of understanding and managing conflicts between the EU and ECHR and national law, and particularly the introduction of ‘meta constitutional’ norms into the post-state arena will form the

¹¹ N. Walker, ‘Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders’ (2008) 6 (3/4) *I*CON* 373-396.

¹² For a recent examples see P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?*, (Oxford: OUP, 2010); J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, (Cambridge, CUP, 2009) and J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, (Oxford: OUP, 2009).

¹³ See generally, J. Weiler, *The Constitution of Europe*, (Cambridge: CUP 1999)

¹⁴ L. Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’ (2002) 23(5-7) *Human Rights Law Journal*, 161-165. See also S. Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’ (2003) 23 *Oxford Journal of Legal Studies*, 405-433.

¹⁵ For a comprehensive discussion of this development see W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, The Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’ (2009) 9(3) *Human Rights Law Review*, 397-453.

¹⁶ N. Walker, ‘Flexibility within a metaconstitutional frame: reflections on the future of legal authority in Europe’ in G. de Búrca & J. Scott, *Constitutional Change in the EU: From Uniformity to Flexibility*, (Oxford: Hart Publishing, 2000).

focus of this paper. It will trace the genealogy of constitutional pluralist discourses in the European context before analysing examples of conflicts between national legal orders and that of the EU and ECHR. It will then proceed to challenge the current state of the literature describing EU conflicts in terms of ‘constitutional pluralism’ and ECHR conflicts as more radical pluralism. In doing so it will problematise the concept of constitutionalism in order to illustrate that the constitutional label is more appropriate to ECHR conflicts where there is agreement on common values than the EU, which relate to the question of sovereignty and are therefore not amenable to constitutional resolution. It concludes by arguing that EU conflicts are better understood as not being pluralist at all but as forms of ‘institutional disobedience’ which is part of any governing constitutional authority.

A Genealogy of Constitutional Pluralism in Europe

The founding father of European constitutional pluralism is undisputedly Neil MacCormick, who developed the notion throughout the 1990s in response to the changing legal landscape of EU law.¹⁷ The authority of EU law had developed considerably over the 60s and 70s such that its central doctrines of primacy,¹⁸ direct effect¹⁹ and interpretative autonomy²⁰ had become accepted by national judicial actors (and those who rejected it had the good manners to keep reasonably quiet about it by refusing to make preliminary references or finding that EU was not applicable to the particular case at hand). However the *Maastricht* decision of the German Federal Constitutional Court, the *Bundesverfassungsgericht* (BVG), shattered this complacent picture of the obedient reception of EU law into national legal systems.²¹ The BVG found, almost as a side issue to the controversy at hand –the constitutionality of German ratification of the Treaty on European Union in 1993 - that in cases of conflict between EU law and the German Constitution, that the German constitution would prevail. The decision blew a hole in the hierarchical Kelsen-inspired view of the EU legal order as a hierarchical *constitutional* legal system perched at the apex of national legal systems as encouraged by the ECJ’s constitutionalising decisions, particularly the primacy doctrine.

Drawing on his own formulation of legal systems in terms of institutional normative orders, MacCormick found that EU and national legal orders made legitimate claims to their own authority, in this sense were constitutional, and as such, *both* claims were to be taken seriously.²² It was in the nature of institutional normative

¹⁷ N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56(1) *Modern Law Review*, 1-18; ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1(3) *European Law Journal*, 259-266; ‘Risking Constitutional Collision in Europe?’ (1998) 18(3) *Oxford Journal of Legal Studies*, 517-532; collected in refined in *Questioning Sovereignty* (OUP: 1999).

¹⁸ Established in Case 6/64, *Costa v. ENEL* [1964] ECR 585.

¹⁹ Established in Case 26/62, *Van Gend en Loos* [1963] ECR 13.

²⁰ Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost* [1997] ECR 4199.

²¹ *Brunner v. The European Union Treaty* [1994] 1 CMLR 57.

²² As MacCormick himself notes there is an affinity between the notion of an institutional normative order and systems theoretical approaches to legal systems as ‘autopoietic’ social systems. See *Questioning Sovereignty*, above, p. 109.

orders that they are self-referentially authoritative and therefore they cannot be hierarchically ordered. Thus, the interaction and conflicts between these legal systems entailed an ‘epistemic pluralism’²³ whereby the resolution of a particular clash between national and supranational legal systems would depend on the viewpoint from which the conflict was approached. Thus, there was no privileged position, no ‘Archimedean’ point from which the claims of EU law or national law could be adjudicated in order to resolve a particular legal conflict.

For MacCormick, this could not be otherwise as the actors involved approach the question of conflict from different vantage points, with reference to different normative systems, national and supranational which could only yield an answer according to that system. It was self-evident that ‘the highest authority in any normative order can appeal to no higher positive confirmation of its own authority than that enshrined in its own jurisprudence.’²⁴

The resulting scenario was characterised by MacCormick in terms of a pluralist conception of law and legal system, implicitly drawing on sociological and anthropological accounts of legal pluralism.²⁵ However, rather than pluralism obtaining between informal and culturally-based norms and formal institutional legal structures redolent of conventional legal pluralism, MacCormick posited a legal pluralism between formal structures of positive law, national and supranational, replete with *Grundnorm* or rule of recognition and their own internally coherent hierarchy.²⁶ The initial formulation of this constitutional pluralist conception of law was ‘radical’ in that the law had nothing to say about the resolution of such conflicts given that an overarching applicable law was unavailable in the pluralist universe. Thus the clash of legal regimes was analogous to realist ‘billiard ball’ theories of International Relations where conflict was an inevitable feature of systemic interaction.²⁷ However, MacCormick subsequently went on to develop a more nuanced account of this regime conflict, whereby he reasoned that both national and supranational legal orders were subject to the overarching authority of international law.²⁸ Thus legal conflict between national constitutional norms and those of EU law could be resolved according to the authority of the international legal system, a position which he eponymously dubbed ‘pluralism under international law’.²⁹

On this solid foundation, constitutional pluralism has become a force to be reckoned with in European Constitutional discourse, and in constitutional theory more generally. Subsequent scholars have put flesh on the bones of MacCormick’s pluralist insights by theorising the ontology of constitutional pluralism³⁰ as well as providing mechanisms for the resolution of constitutional pluralism in the EU and ECHR contexts by reference to systems other than international law. Of the various ways of

²³ N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) *Modern Law Review*, 317, at 338.

²⁴ MacCormick, *Questioning Sovereignty*, above, pp. 109.

²⁵ See N. Krisch, ‘The Case for Pluralism in Postnational Law’, *LSE Law, Society and Economy Working Papers*, 12/2009.

²⁶ Krisch, *The Case for Pluralism*, p. 14. For more conventional accounts of legal pluralism, see J. Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1.

²⁷ For a classic account, see H. J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (New York: NY: Knopf, 1948).

²⁸ MacCormick, *Risking Constitutional Collision, and Questioning Sovereignty*, pp. 117.

²⁹ *Ibid.*

³⁰ See N. Walker, *The Idea of Constitutional Pluralism* above.

thinking about pluralism in European legal conflicts, three approaches in particular stand out in respect of EU legal conflicts; Mattias Kumm's model of Constitutionalism Beyond the State,³¹ Miguel Maduro's principles of contrapunctual law³² and Sabel and Gerstenberg's more recent 'polyarchic' co-ordinate constitutionalism³³; and Krisch's characterisation of the 'open architecture' of European human rights law stands out in respect of the ECHR system.³⁴

Pluralism and the EU Legal Order

Kumm's model of 'Constitutionalism Beyond the State' provides a framework for the resolution of conflicts between national and EU legal orders.³⁵ He identifies three specific scenarios in which such conflicts may arise. Firstly, conflict may occur where the application of EU law threatens the rights contained in a national bill of rights protected in national constitutions. The second scenario in which such conflicts may arise relate to questions of who gets to decide the boundaries of the legality or constitutionality of EU law. Finally, such conflicts may emerge with respect to constitutional provisions that reflect 'specific national commitments'³⁶ but are of not the first special category of fundamental rights. Examples of this category include the Greek constitutional requirement of compulsory higher education in Greece and the German restrictions on military service.³⁷ These issues could (and in many cases are) regulated by ordinary statute in other jurisdictions.

In order to manage these conflicts Kumm develops principles of Constitutionalism beyond the state which are to inform and guide adjudication in cases of conflicts between national and EU law in the scenarios outlined above. Rather than making a 'tragic choice' choosing one regime over the other as radical pluralism entails, Kumm advocates that courts take inspiration from *both* regimes according to the principle of best fit.³⁸ Thus, for Kumm:³⁹

³¹ Developed in M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 *Common Market Law Review*, 351, and 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy before and after the Constitutional Treaty' (2005) 11(3) *European Law Journal*, 262-307.

³² M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker(ed.), *Sovereignty in Transition*, (Oxford: Hart Publishing, 2003), 501-38 and 'Europe and the Constitution: What if this is as good as it gets?' in J. H. H. Weiler & M. Wind, *European Constitutionalism Beyond the State*, (CUP: 2003), 74-102.

³³ C. Sabel and O. Gerstenberg, 'Constitutionalising an Overlapping Consensus: the ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16(5) *European Law Journal*, 511-550.

³⁴ N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) *Modern Law Review*, 183-216.

³⁵ Kumm, *Arbiter and Jurisprudence of Constitutional Conflict*, above.

³⁶ Kumm, *Jurisprudence*, 296.

³⁷ Kumm, *Jurisprudence*, 297.

³⁸ Kumm, *Jurisprudence*, 286. The affinity between this approach and Dworkin's notion of best fit as part of his theory of integrity is explicitly acknowledged by Kumm. The Dworkinian elements of this model are further evident in his rephrasing of the question in terms of what makes national and European constitutional practice in Europe appear in its best light?, *Jurisprudence*, 286; drawing on Dworkin, *Law's Empire*, (1986).

³⁹ Kumm, *Jurisprudence*, 286.

‘the right conflict rule or set of conflicts rules for a national judge to adopt is the one that is best calculated to produce the best solution to realise the ideals underlying legal practice in the European Union and its Member states’.

Kumm goes on to elaborate the conflict rules for such collisions in terms of an open-ended series of framework principles. At the top of the list, a ‘priority to legality’ principle⁴⁰, creates a presumption in favour of the effective and uniform enforcement of EU law. Thus, the starting point of any question of conflict between EU and national constitutional law must be the commitment to the uniform and effective application of EU law. This presumption is, however, rebuttable, by three sub-principles; fundamental rights protection, subsidiarity and democratic legitimacy.⁴¹ The principle of legality can be subjected to constitutional review, if and only if, the application of EU law threatens fundamental rights *and* EU law does not offer adequate protection to fundamental rights protection in the national court’s view.⁴² With respect of subsidiarity, national courts are within their rights to disregard EU law where it deems the EU institutions to have transgressed their jurisdictional boundaries and acted *ultra vires* and there are insufficient safeguards (presumably, for example, judicial review) to ensure that the EU acts within the limits of the treaties.⁴³ Finally, the principle of democratic legitimacy can dislodge the presumption of the effectiveness and uniformity of EU law where national courts deem EU law to violate specific national constitutional commitments to the democracy, such as, for example, the right to vote and the rights of democratically elected institutions to govern and make policy which have been common themes in the BVGs decisions on the constitutionality of German treaty ratification.⁴⁴

These principles, then, provide a ‘starting point and structuring device’⁴⁵ without dictating any particular outcomes in individual cases, but rather fostering ‘mutual deliberative engagement’⁴⁶ between national and supranational actors.

A similar deliberative approach to conflicts between EU law and national law informs Maduro’s solution, couched in terms of the musical device of counterpoint.⁴⁷ In his ‘principles of contrapuntal law’ Maduro, like Kumm, devises a series of considerations or rules to be utilised by courts when facing conflicts between national and EU law. Using the ‘radical pluralism’ position as his starting point, and accepting the inevitability of the self-referential nature of legal systems, Maduro argues that in practice, both national and supranational actors engage in mutual construction of the EU legal order through mutual accommodation, however principles are necessary to reduce and manage the conflicts as well as providing a way of promoting communication between courts.⁴⁸

⁴⁰ Priority to rights is central to Alexy’s ‘balancing’ model of constitutional rights. See R. Alexy, *A Theory of Constitutional Rights*, (OUP: 2002) and ‘Constitutional Rights, Balancing and Rationality’ (2003) 16(2) *Ratio Juris*, 131-40.

⁴¹ Kumm, *Jurisprudence*, 299-300.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Kumm, *Jurisprudence*, p. 301.

⁴⁶ *Ibid.*

⁴⁷ Maduro, *Contrapunctual Law and As good as it gets?*, above.

⁴⁸ Maduro, *Contrapunctual Law*, 524.

For Maduro, all actors engaged in the process of developing EU constitutionalism must commit to the principles of pluralism, consistency and vertical and horizontal coherence, universalisability and institutional choice which provide the common basis for discourse. Like Kumm's model, these principles are 'framework principles', which he frames in terms of Sunstein's 'incompletely theorised agreements',⁴⁹ which attempt to balance the competing considerations of harmony and diversity in a complex configuration such as the EU.

The principle of pluralism embodies the epistemic dimensions of constitutional pluralism whereby legal systems interact in a relationship of heterarchy rather than hierarchy and courts accept and respect each other's identity and self-determination.⁵⁰ The principle of consistency and coherence ensure that the pluralism of legal systems does not lead to fragmentation by requiring that all actors share a commitment to a coherent legal order and a minimal set of discourse principles.⁵¹ Moreover national judicial actors must be cognisant that they are engaged in a common enterprise; that of the construction and development of the EU legal order. Thus, they must not view their engagement with EU law in isolation, in a purely vertical relationship with the ECJ, but as one of many voices engaged in a joint venture with courts from other Member states. Thus, the coherence must be horizontal as well as vertical.⁵² The related principle of universalisability is the instrumentalisation of the coherence principle requiring that courts, both national and European, are able to justify their decisions in the context of a coherent and integrated European legal order, such that national decisions in EU law are argued in 'universal' terms.⁵³ More vaguely, the principle of institutional choice requires the adoption by courts of a new legal methodology' according to Komesar's comparative institutional analysis.⁵⁴

Focusing on the first of Kumm's conflict scenarios, Sabel and Gerstenberg analyse recent decisions involving fundamental rights conflicts such as *Omega*,⁵⁵ *Schmidberger*⁵⁶ and *Kadi*⁵⁷ to argue that in practice a 'coordinate constitutionalism'⁵⁸ entailing a 'jurisprudence of mutual monitoring and peer review'⁵⁹ is emerging between normative orders in Europe. This coordinate constitutionalism does not only exist between the EU and national legal orders but also between national and other supranational orders such as the ECHR, between supranational orders themselves; the EU and ECHR and between supranational and international orders such as the EU and the UN. Thus the structure is 'polyarchic'⁶⁰ entailing a plurality of orders and interactions.

⁴⁹ Maduro, *Contrapunctual Law*, 525.

⁵⁰ Maduro, *Contrapunctual Law*, 526.

⁵¹ Maduro, *Contrapunctual Law*, 527.

⁵² Maduro, *Contrapunctual Law*, 529.

⁵³ Maduro, *Contrapunctual Law*, 530.

⁵⁴ Maduro, *Contrapunctual Law*, 531.

⁵⁵ Case C-36/02 *Omega Spielhallen*, above.

⁵⁶ C-112/00, *Schmidberger v. Austria*, above.

⁵⁷ Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, Judgment of 3 September 2008.

⁵⁸ Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, p. 512.

⁵⁹ *Ibid.*

⁶⁰ Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, 513.

Similar to the other accounts, this co-ordinate constitutionalism requires that legal actors respect the autonomous claims of other systems and defer to them provided that such defence doesn't violate constitutional essentials as determined by the indigenous court of the relevant legal order. They promote the BVG's *Solange* jurisprudence as the ideal type of this coordinate constitutionalism whereby the BVG agreed to defer to the norms of EU law provided that it didn't violate the constitutional essentials, in this case the rights contained in the Bill of Rights in the basic norm.⁶¹ Their model, then, is strongly resonant with Kumm's however Sabel and Gerstenberg opt for Rawls rather than Dworkin and Alexy as the inspiration for the framework, adopting his device of the 'overlapping consensus' as a model through which to characterise and manage such conflicts.⁶² The 'freestanding political view' of individuals in Rawls' scheme in coordinate constitutionalism becomes the autonomy of the various legal systems viewpoints.⁶³ Moreover, and in an echo of Maduro's commitments, the participants accept a commitment to basic principles of justice to which the various comprehensive views of the participants must be calibrated.⁶⁴ Out this a form of 'public reason' evolves which acts as a filter for the kind of reasons and justifications that are acceptable for individual decisions.⁶⁵ As with the other models of constitutional pluralism, the polyarchic nature of this system means that the question of final say, or Kompetenz-Kompetenz remains unresolved as the process is on-going and the calibration of comprehensive view to overlapping consensus in individual decisions is not definitive. Moreover, the model bears traits of Maduro's horizontal coherence in that the decisions must be acceptable to all the participants in the process which is implicit in the public reason requirements of decision-making in coordinate constitutionalism.

From Radical Pluralism to Constitutional Pluralism: Metaconstitutionalism

As noted above, when Neil MacCormick first sketched out his ideas of the potential relationship between national and supranational legal orders in the EU context, he opted for a conceptualisation of the relationship in terms of 'interactive rather than hierarchical'⁶⁶ which represented a pluralistic rather than a monistic view of the EU-national law relationship. Thus, as a matter of jurisprudential logic, it was clear that national constitutional courts deny the competence of an external adjudicative forum such as the ECJ to decide on the applicability of the norms of the domestic constitutional systems and *vice versa*. Thus, the relationship is pluralistic in that there is an irreconcilable core a 'vanishing point'⁶⁷ of the national/supranational relationship whereby in the final analysis, each systems claims its own interpretative autonomy. This pluralistic conception of legal systems, and those of the national and EU systems in particular, was a acknowledgment that '*not all legal problems can be*

⁶¹ BVerfGE 37, 271 (*Solange I*), English translation at [1974] 2 CMLR 540; 73, 339 (*Solange II*); English translation at [1987] 2 CMLR 225.

⁶² Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, p. 513. See also J. Rawls, 'The Idea of an Overlapping Consensus' (1987) 7(1) *Oxford Journal of Legal Studies*, 1.

⁶³ See Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, p 544.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ MacCormick, *Sovereignty Now*, 263.

⁶⁷ B. Van Roermund, 'Instituting Authority: Some Kelsenian Notes' (2002) 15 *Ratio Juris* 206.

solved legally'.⁶⁸ The resolution of any conflicts emerging between the systems, then, for MacCormick, was a matter for 'circumspection and for political as much as legal judgement'.⁶⁹

In later work, however, MacCormick offered an alternative to this position which he subsequently dubbed 'radical pluralism' to a 'pluralism under international law'⁷⁰ whereby the resolution of conflicts between national and supranational legal orders could, ultimately, be resolved with respect to the norms of public international law. This move entailed a conceptualisation of the legal universe as a form of monism, where all law ultimately derives from international law, and MacCormick himself acknowledged that this favoured conclusion was a particular remove from a truly pluralistic conception of legal systems.⁷¹ What remained pluralist about this conception, however, was that the EU and national legal orders remained in a heterarchical and pluralist relationship albeit under the umbrella of the international legal order, thereby underscoring their autonomous and non-derivative status from each other. Thus, EU law could not claim (as could be interpreted from the federalist primacy doctrine) that national law was derivative from EU law from the jurisprudential point of view, but perhaps more importantly, Member States could not claim that EU law was derivative of, and therefore subordinate to, national.

Pluralism under international law, then, meant that international law set conditions on the validity of state and EU constitutions and their interpretation thereby imposing 'a framework on the interactive but not hierarchical relationship between systems'.⁷² Most significantly on this view, MacCormick's pluralism under international law meant that 'we need not run out of law (and into politics) quite as fast as suggested by radical pluralism'.⁷³

The risks associated with running from law to politics were not explored by MacCormick himself. However, the rationale for imposing a frame of rules or principles on the interaction between national and supranational legal systems is explicitly addressed at length by Kumm.⁷⁴ Kumm recognises the problems faced by courts in cases of constitutional conflict and particularly the limited capacity of courts to take overtly political decisions. If radical pluralism entails judges engaging in judicial *realpolitik*, their own legitimacy comes into question as *judicial* actors.⁷⁵ Not only this, but as the 'weakest political branch'⁷⁶, the overtly political decisions they make are futile unless they receive the endorsement of political actors.⁷⁷ These questions of the legitimacy of courts in public law adjudication are not particular to

⁶⁸ MacCormick, *Sovereignty Now*, 265.

⁶⁹ Ibid.

⁷⁰ MacCormick, *Risking Constitutional Conflict*, p. 527, *Questioning Sovereignty* p. 117.

⁷¹ Ibid.

⁷² MacCormick, *Risking Constitutional Conflict*, 529.

⁷³ MacCormick, *Risking Constitutional Conflict*, 531.

⁷⁴ Kumm, *Jurisprudence*, 279.

⁷⁵ For a forceful critique of constitutional pluralism in EU law based on concerns of judicial legitimacy and the rule of law, see J. Baquero-Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14(4) *European Law Journal*, 389-422, at 414.

⁷⁶ Kumm, *Jurisprudence*, 279 quoting from A. Hamilton, *Federalist*, (Buccaneer Books, 1992) and A. Bickel, *The Least Dangerous Branch: The Supreme Court as the Bar of Politics* (Yale University Press, 1962)

⁷⁷ Kumm, *Jurisprudence*, 277.

normative conflicts however they are thrown into sharp relief in this context due to multilevel or pluralistic legal universe in which they operate. Thus, for reasons of legitimacy and efficiency, Kumm emphasises the necessity of *legal* reasoning, where law ‘constrains and guides the decision maker’⁷⁸ which is part of the ‘division of labour’ in constitutional systems and, more importantly ensures the legitimacy of courts in the decision-making process.⁷⁹

What is central to the development of principles of constitutional pluralism is the existence of some sort of external *standards* by which EU constitutional conflicts can be resolved, both to ensure the coherence of the structure overall⁸⁰, as well as to prevent courts, both national and supranational, becoming purely ‘political’ actors, making decisions according to legally unconstrained political factors⁸¹ thereby undermining their legitimacy. Thus principles of constitutionalism beyond the state, contrapunctual law and co-ordinate constitutionalism are designed, in part, to manage these problems.

What all this speaks to, it is submitted, is a preponderance of theorising constitutional conflicts in Europe in favour of restraints and order on pluralistic conceptions of European law and a shift from legal pluralism *simpliciter* to *constitutional* pluralism. In this regard, what constitutional pluralism presupposes, then, is a *metaconstitution* which provides an ‘authoritative version of the ... political order’⁸² and a ‘legitimizing trans-systemic canopy’⁸³ over the whole. These metaconstitutional standards, be they Kummian principles, the higher order of MacCormick’s international law, principles of contrapunctual law or the overlapping consensus of coordinate constitutionalism, are not the constitutional rules themselves but ‘rules about constitutional rules’.⁸⁴ The *constitutional* epithet in constitutional pluralism, moreover, relates to ‘higher or deeper constitutional authority’⁸⁵ of these metaconstitutional rules and principles which therefore constitute, if not higher law, then higher guiding principles above and beyond the interacting legal systems themselves. As such this ultimate hierarchical ordering of rules or principles under an overarching metaconstitution speaks to the constitutionalising of legal pluralism in Europe.

The constitutional pedigree of these metaconstitutional rules is evident in the adoption of state-based domestic constitutional theories to devise principles and

⁷⁸ Kumm, *Jurisprudence*, 282.

⁷⁹ Kumm illustrates the problems with radical pluralism in respect of constitutional conflicts and the necessity of legal reasoning in the context of EU constitutional conflicts, by adopting the Dworkinian device of a hypothetical judge deciding EU constitutional conflicts, although in this scenario he adopts Voltaire’s Logomachos rather than Dworkin’s Hercules. Logomachos does not engage in legal reasoning, that is reasoning by reference to legal constraints and therefore his legitimacy is in question; Kumm, *Jurisprudence*, 283.

⁸⁰ And indeed the project of legal integration more broadly, see Cappelletti, M., Secombe, M. and Weiler, J. H.H., *Integration Through Law: Europe and the American Federal Experience. A General Introduction in Integration Through Law: Europe and the American Federal Experience/3 Vols*, edited by M. Cappelletti, M. Secombe and J. H. H. Weiler. (Berlin/New York: de Gruyter, 1986).

⁸¹ a la Logomachos, Kumm, *Jurisprudence*, 283.

⁸² Walker, *Flexibility*, 12.

⁸³ *Ibid.*

⁸⁴ Walker, *Flexibility*, 15)

⁸⁵ *Ibid.*

standards to order such conflict. As noted above, for example, Kumm draws on Dworkin's conception of constitutional principles as part of the conception of law in his constitutionalism beyond the state⁸⁶ as well as Alexy's theories of 'balancing' to manage in a normative fashion, the rival interests at stake.⁸⁷ Maduro, adopts Sunstein's conception of 'incompletely theorised agreements' which provide, in Sunstein's account, the foundation of constitutional order.⁸⁸ Similarly, Sable and Gerstenberg's coordinate constitutionalism is, like Kumm's constitutionalism beyond the state, more overtly constitutional in its title, and draws upon the Rawlsian model of overlapping consensus to produce the metaconstitutional principles which inform the interaction of legal systems in Europe.⁸⁹ This constitutional function of overlapping consensus was explicitly acknowledge by Rawls;⁹⁰

'[t]he idea of an overlapping consensus enables us to understand how a constitutional regime characterised by the fact of pluralism might, despite its deep divisions, achieve stability and social unity by the public recognition of a reasonable political conception of justice'

Finally, whereas MacCormick does not explicitly state it, his pluralism under international law speaks to a constitutional conception of the international legal order as metaconstitution, providing the hierarchical and authoritative rules on the behaviour of states (and indeed non states such as the EU).⁹¹ The analogies with Kelsen's later monistic conception of the legal universe in terms serves to support the constitutional credentials of MacCormick's pluralism under international law.⁹²

The ECHR: the poor relation of supranational Constitutionalism

⁸⁶ Kumm, *Jurisprudence*, 268.

⁸⁷ Ibid.

⁸⁸ Although he does make clear that he does not thereby endorse Sunstein's theory of judicial action and legal reasoning, Maduro, *Contrapunctual Law*, 54. Examples of such incompletely theorised agreements include constitutional provisions such as the US constitution's equal protection clause or the first amendment guaranteeing free speech and as such are the hallmark of constitutional law. As such then, the 'incompletely theorised agreements' approach sees these agreements as part of a theory of *authority* and therefore *constitutional* in the legal context. See generally C. Sunstein, 'Incompletely Theorized Agreements' (1995) 108(7) *Harvard Law Review*, 1733-1772, especially pp. 1749 and 1770.

⁸⁹ Rawls, *Idea of Overlapping Consensus*, pp. 2. See also R. Parker, 'The Jurisprudential Uses of John Rawls' and R. Moore, 'Rawls on Constitution-Making' both in J. Pennock and J. Chapman (eds.), *Constitutionalism, Nomos XX*, (New York: New York University Press, 1979)

⁹⁰ Rawls, *Idea of Overlapping Consensus*, pp. 2.

⁹¹ In this respect it resonates with recent literature on the constitutionalization of public international law. J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, (Cambridge, CUP, 2009) and J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, (Oxford: OUP, 2009).

⁹² On the role of Kelsen's theory of law in the notion of international legal constitutionalism see A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 1(47) *Harvard International Law Journal*, 223- 242 and A. Somek, 'Kelsen Lives' (2007) 18(3) *European Journal of International Law* 409-451.

Notwithstanding an early passable imitation by the ECtHR of the ECJ's constitutionalising judgments,⁹³ the notion of the ECHR as a constitutional system has been a relatively recent phenomenon.⁹⁴ This view has, in part been prompted by more daring recent pronouncements from the Court itself defining the Convention in terms of a 'constitutional instrument of a European Public Order'.⁹⁵ The late evolution of ECHR constitutionalism is perhaps explicable by the notable absence of claims by the ECtHR comparable to the ECJ in its case law claiming the direct effect and primacy of the norms of the Convention system over national law, the articulation of constitutional principles of *adjudication* being the most developed element of ECHR constitutionalism.⁹⁶ Also the all-important element of hierarchy so central to EU constitutionalism as instrumentalised in the primacy doctrine, has been explicitly refuted by the ECtHR which has repeatedly insisted on the primary responsibility of Contracting states to ensure the protection of fundamental rights and the 'subsidiary' nature of the Court's supervision.⁹⁷ Moreover, the characterisation of the ECHR in constitutional terms tends to be based on pragmatic grounds to reduce the ECHR's immense workload rather than ontological or normative considerations.⁹⁸ As such, and even in the most constitutionalist literature, the consensus seems to be that the ECHR system falls more into the international legal category than the *sui generis* or 'thicker constitutional' EU system.

Notwithstanding its more frugal constitutional pedigree and the more modest claims and demands made by the Court on the Convention's signatory states, the relationship between national law and the ECHR has not been plain sailing.⁹⁹ Arguably as a reaction to a more confident bench at Strasbourg in part due to the reforms of the 1990s¹⁰⁰ the Court has become increasingly demanding with respect to the compatibility of state measures with the Convention, and has given states a narrow berth under its (in)famous margin of appreciation, resulting in more contentious and conflictual relations between national courts and the ECtHR.¹⁰¹ These

⁹³ For example, in the seminal *Ireland v. U.K.* decision, the Court couched its conception of the convention system in similar language to the ECJ's *Van Gend* decision, finding that 'unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contract States. It creates, over and above a network of mutual, bilateral undertakes, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement" and that "the rights and freedoms ... would be direct secured to anyone in the jurisdiction of the Contracting States' and that '[national authorities] must prevent or remedy any breach at subordinate levels'. *Ireland v. U.K.* A 25 (1978); 2 EHRR 25, para. 239.

⁹⁴ See, for example, S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23(2) *Oxford Journal of Legal Studies*, 405-433.

⁹⁵ *Bosphorus Airways*, above, para. 156. For a relatively early account of ECHR constitutionalism see J. Frowein, 'The European Convention on Human Rights as the Public Order of Europe' (1992) Vo. 1:2 *Collected Courses of the Academy of European Law*, 267.

⁹⁶ Greer, *Constitutionalising Adjudication*, 408.

⁹⁷ *Ibid.*

⁹⁸ Greer, *Constitutionalising Adjudication*.

⁹⁹ See Krisch, *Open Architecture*.

¹⁰⁰ Which finally put the Court on a permanent basis. See generally S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (CUP, 2006).

¹⁰¹ Again, the BVG was at the forefront of this developed in its *Gorgulu* decision. See Krisch, *Open Architecture*, 183. The Irish Supreme court, moreover, has explicitly denied any obligation to follow the ECHR's case law where it conflicts with the Irish constitution. See *McD* [2009] IESC 81, particularly Murray CJ, framing the relationship as one of traditional dualism.

conflicts have resulted in more attention being paid to the ECtHR and the conflicts between the convention and particularly its interpretation by the Court, and national law. Krisch's recent work is exemplary in this regard.¹⁰²

In terms of the pluralist element in the potential conflicts between national systems and the ECHR systems, Krisch, as part of his thesis on the pluralist structure of postnational law more generally,¹⁰³ identifies pluralism as providing the 'open architecture' of the ECHR system.¹⁰⁴ He explicitly rejects the constitutional model of pluralism for the ECHR system due to its homogenising and hierarchical tendencies which fail to capture the fragmented realities of post-national society as well as the rejection of hierarchy by those dealing with interactions between the systems.¹⁰⁵ However, the 'open architecture' does not rely on a rigid dualism, according to which domestic constitutional and public international law pass like ships in the night. Rather, echoing MacCormick's radical pluralism, national law and the law of the ECHR are in a heterarchical relationship.¹⁰⁶ However this heterarchy lacks the 'canopy' of an overarching 'metaconstitution' which can resolve disputes between the systems.¹⁰⁷ Thus, unlike Kumm and Baquero-Cruz, Krisch does not decry the courts' dabbling in political questions, and does not attempt to elaborate a scheme of principles or structural framework within which conflicts could be resolved to overcome the anxieties associated with judicial *realpolitik* outlined above. Rather, in the ECHR system, conflicts are resolved, 'through politics rather than legal argument'¹⁰⁸, though the more diplomatic and persuasive mechanisms of 'judicial politics'¹⁰⁹ such as the margin of appreciation and the evolutive approach (a form of interpretative instrumentalism).¹¹⁰ These 'central political tools in a pluralist order'¹¹¹ are the characteristic doctrines of the ECHR system, and the guarantor of its pluralist nature equivalent to the way that direct effect and primacy are the lynchpin of the constitutional credentials of the EU.

Notwithstanding the inclusion of 'constitutional' in their account of the interaction between the ECHR and other legal systems, Sabel and Gerstenberg arrive at a very similar (pluralist) conception of ECHR law to Krisch where the relationship is characterised by heterarchy with 'no final decider and no Archimedean point'.¹¹² While burnishing the ECHR's constitutional credentials to a greater extent than Krisch, Sabel and Gerstenberg similarly identify the margin of appreciation and 'evolutive interpretation' as central to the Court's 'experimentalist and dialogic form of review',¹¹³ speaking to a more pluralist characterisation of the system than that of

¹⁰² Krisch, *Open Architecture, Case for Pluralism*, above, and 'Global Administrative Law and the Constitutional Ambition' in P. Dobner and M. Loughlin, (eds.) *The Twilight of Constitutionalism?* and his monograph, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, (OUP: 2010).

¹⁰³ Krisch, *Beyond Constitutionalism*.

¹⁰⁴ Krisch, *Open Architecture*.

¹⁰⁵ Krisch, *Global Administrative Law*, 255.

¹⁰⁶ Although Krisch himself prefers the term 'systemic' rather than 'radical' pluralism. *Case for Pluralism*, 15.

¹⁰⁷ Krisch, *Open Architecture*, 185.

¹⁰⁸ *Ibid.*

¹⁰⁹ Krisch, *Open Architecture*, 207.

¹¹⁰ *Ibid.*

¹¹¹ Krisch, *Open Architecture* 210.

¹¹² Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, 526.

¹¹³ Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, 535.

the EU where the systems ‘interact’ and ‘negotiate’ the meaning of legal principle.¹¹⁴ Also absent here is an attempt to fashion or define an overarching ‘metaconstitution’ which would apply to cases and guide courts in the resolution of conflict between the systems. Thus, constitutionalism and pluralism, much less constitutional pluralism is less developed in the ECHR system, jettisoning the notion of a metaconstitution¹¹⁵ and leaving the negotiation of conflict to judicial politics.

Questioning Constitutional Pluralism

What is clear from contemporary discourses in the interaction between legal regimes, national, EU and ECHR, then, is that conflicts between national law and EU law are characterised in constitutional terms, in the sense of being resolved through rules of principles of an overarching ‘metaconstitution’, thereby ameliorating the level of judicial politics and providing a normative resolution to problems of legal conflict. On the other hand, conflicts between the ECHR and national law take place through mutual engagement but in the absence of a metaconstitutional superstructure which would govern the relationship and clashes between them.

It is precisely this snapshot of the management of constitutional conflict in Europe which I wish to challenge in the remainder of this paper. Focusing on the meaning and function of constitutionalism and constitutional theory, it will be argued that, in fact, the reverse of the picture outlined here is the case. Conflicts between EU law and national law, given the claims to primacy and autonomy made by the ECJ are, in the final analysis, about sovereignty and are therefore not susceptible to management or resolution according to a metaconstitution. On the other hand, conflicts between the ECHR and national legal systems are about disagreements about the meaning of constitutive values and are therefore precisely the stuff of constitutionalism. To illustrate this, it is worth revisiting examples of conflicts between the EU and ECHR systems with national law in order to better understand their nature. Two recent decisions from Germany and the UK provide clear examples of these conflicts; the BVerfG’s *Lisbon* decision¹¹⁶ and the UK Supreme Court’s decision in *Horncastle*.¹¹⁷

Maastricht Redux: The BVerfG’s ‘Lisbon’ Judgment

The boldness shown by the BVerfG in its Maastricht decision in 1993 was contagious, with ever more national supreme courts following its lead in finding for ‘national constitutional primacy’ in the relationship between EU and national law.¹¹⁸ Even if the pluralist conception of EU law became increasingly adopted as the default

¹¹⁴ Sabel & Gerstenberg, *Constitutionalising an Overlapping Consensus*, 524.

¹¹⁵ At least in the thicker sense used in respect of the ECHR. Walker identifies international human rights law as a potential metaconstitution of global order, however, this discussion is beyond the focus of the current paper. Walker, *Flexibility*, p. 19-20.

¹¹⁶ BVerfG, 2 be 2/08, *Re Ratification of the Treaty of Lisbon*, Judgment of 30 June 2009, English version available at [2010] 3 *Common Market Law Reports* 13.

¹¹⁷ *R. v. Horncastle and others*, [2010] 2 WLR; [2009] UKSC 14.

¹¹⁸ For a number of examples, see Baquero-Cruz, *Legacy*. For examples specifically from the newer Central and Eastern European states, see W. Sadurski, ‘Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union’ (2008) 14(1) *European Law Journal*, 1-35.

position of national supreme courts, the BVG again found itself at the forefront of the pluralist movement in its decision on the constitutionality of German ratification of the Lisbon treaty handed down in June 2009.¹¹⁹ As with the *Maastricht* decision 16 years earlier, the decision is paradigmatic of conflicts and pluralism in the relationship between national and EU law.¹²⁰ Once more, the discussion and reasoning of the decision was more significant than the final decision taken, given that the court found that German ratification of the Lisbon treaty would not violate the German constitution *per se*, but the most significant and interesting part of the judgment are the Court's deliberations on the nature of EU law and, more importantly from the pluralist perspective, the relationship between EU law and national law. The subject of the challenge was the constitutionality of German ratification of the Lisbon Treaty of 2008, however the real target of the decision was the ECJ's claims regarding the primacy and autonomy of the EU's legal order as well as its assertion of its own interpretative autonomy regarding the extent and limits of EU law which was forcefully reprised in its *Kadi* decision.¹²¹

The challenge was based on the alleged violation of various provisions of the German constitution, in particular the constitutional protection of democracy and the right to vote contained in Articles 38 and 20 of the basic law¹²² as well as the limits of permissible integration established by the constitution in Article 23 combined with Article 79, the so-called 'eternity' clause which places an absolute prohibition on the amendment of certain provision of the basic law.¹²³ In terms of the typologies of conflicts between EU law and national law outlined by Kumm, then, this case dealt primarily with the question of the patrolling of the limits on European integration imposed by the constitution which could include review of the activities of the EU institutions, including the ECJ itself, from acting *ultra vires*. Moreover, as was argued before, and accepted by, the Court, the right to vote and the principle of democracy could be threatened by European integration where the level of integration had evolved to such an extent that national institutions, for which German citizens voted, had transferred so much power to Brussels that they no longer retained any significant governing power making the right to vote - in the sense of having a say in the composition of the bodies which take political decisions - illusory.¹²⁴ This could not, the Court argued, be compensated by the democratic nature of the European Parliament nor the indirect democratic legitimacy of the Council of Ministers. However, what is most significant from the point of view of pluralism, was the rejection of the ECJ's claims to the primacy of EU law and the autonomy both of the EU legal order and its own autonomy vis-à-vis the interpretation of that order. This

¹¹⁹ *Re Ratification of the Treaty of Lisbon* [2010] 3 *Common Market Law Reports* 13. For a wide ranging discussion of the decision both in terms of German constitutional law as well as EU law and beyond, see the special issue of the *German Law Journal* (2009) Issue 10.

¹²⁰ Indeed, the *Maastricht* decision was instrumental in the development of MacCormick's pluralist conception of EU law. See in particular MacCormick, *Sovereignty Now*.

¹²¹ Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, above.

¹²² For current purposes, the terms 'basic law' and 'constitution' are used interchangeably.

¹²³ Namely the federal nature of the German state as well as the bill of rights contained in Articles 1 to 20 of the basic law.

¹²⁴ *Re Ratification of the Treaty of Lisbon*, Para. 184-186.

was achieved through the Court's own tendentious characterisation of the EU *qua* political actor and polity.

Reprising its position in Maastricht with respect to the nature of the EU in constitutional terms, the Court found that the EU was not a state but rather an 'association of sovereign states',¹²⁵ which was clear from the operation of the activities of the EU according to the principle of conferral.¹²⁶ As such, the Member States of the EU remain the 'masters of the Treaties'¹²⁷ whereas the EU exercised only 'derived public authority'¹²⁸ which had 'secondary i.e. delegated, responsibility' for the tasks conferred on it.¹²⁹ As such, the EU itself emphatically lacked *Kompetenz-Kompetenz*, a situation which was not changed by the Lisbon reforms.¹³⁰ Therefore, the 'substance' of the authority of the German state, the German constituent power, was not undermined or threatened by the EU.

In terms of the legal effects of EU law in the light of this particular political ontology, the Court found that the primacy doctrine does not affect the validity of conflicting provisions of national law but rather 'only inhibits its application to the extent required by the treaty and permitted by them under national legislation adopted to give effect to them within the Member states'.¹³¹ The Court found that Declaration No. 17 on the primacy of EU law attached to the Lisbon Treaty, which constitutes an express political recognition and endorsement of the primacy doctrine as formulated by the ECJ, did not 'recognise an absolute primacy of application of EU law'¹³² which would in any case not be constitutional, but rather 'confirms' national constitutional courts' position on primacy and particularly the supervisory function of national constitutional courts with respect to national constitutions. It emphatically rejected a position whereby primacy would be equated with the hierarchy of federal law in federal systems which would 'allow for a derogation from contrary constitutional law of the Member States'.¹³³

As such, then, with respect to the question of the 'last word' or 'final arbiter' of constitutionality in Europe, the court asserted its own 'right to pass final judgment'¹³⁴ on the constitutionality and the validity of the laws applying on German territory. In case there was any ambiguity as to the Court's attitude to the primacy and interpretative autonomy of the EU legal order, the court concluded that:¹³⁵

'Member States courts with a constitutional function may not, within the limits of the competences conferred on them – as is the position of the Basic Law - be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of inviolable constitutional identity.

¹²⁵ *Re Ratification of the Treaty of Lisbon*, para. 238.

¹²⁶ *Ibid.*

¹²⁷ *Re Ratification of the Treaty of Lisbon* para. 247.

¹²⁸ *Re Ratification of the Treaty of Lisbon* paras. 242-248, *Emphasis Added*.

¹²⁹ *Re Ratification of the Treaty of Lisbon*, paras. 277-280.

¹³⁰ *Re Ratification of the Treaty of Lisbon*, paras. 289-298.

¹³¹ *Re Ratification of the Treaty of Lisbon*, para. 311.

¹³² *Re Ratification of the Treaty of Lisbon*, 307.

¹³³ *Ibid.*

¹³⁴ *Re Ratification of the Treaty of Lisbon* para. 275.

¹³⁵ *Re Ratification of the Treaty of Lisbon*, para. 312.

Whereas this finding does not differ significantly from the Court's position in the Maastricht decision, it is striking in its categorical rejection of the ECJ's claims to the 'special and original nature'¹³⁶ of EU law which justified its primacy over national (even national constitutional) law. Moreover, this reaffirmation of national constitutional supremacy occurred even in the light of the express political recognition of the primacy of EU law in Declaration 17 appended to the Lisbon Treaty. As such, then, the Lisbon judgment, like the Maastricht decision before it, reaffirmed the pluralist conception of the EU legal order.

Conflict and Dialogue: the UK Supreme Court's 'Horncastle' decision

With respect to the ECHR system, the recent *Horncastle* judgment of the UK Supreme court, like the BVG's Lisbon decision, represents a particularly clear illustration of pluralism between national law and the law of the ECHR.¹³⁷ The decision involved the interpretation of the right to a fair trial, enshrined in Article 6 of the ECHR which has been implemented into UK law through the Human Rights Act 1998 (HRA).¹³⁸ More specifically, the case involved the admissibility of hearsay evidence in a number of criminal trials which had led to the conviction of the defendants in a series of joined cases. In each of the cases, evidence had been introduced by the prosecution which the defendants had been unable to challenge due to the fact that the witness was deceased by the time the trial was heard, the witness was too intimidated to give evidence in open court or the evidence was based on computer generated information. The defendants claimed that the leading of this evidence in their respective trials violated their right to a fair trial under Article 6 ECHR, particularly Art. 6(1)(3)(d) which provides that everyone charged with a criminal offence has the right to *inter alia* 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.¹³⁹

The impugned UK statute, the Criminal Justice Act 2003 (CJA) as a rule prohibited the admission of hearsay evidence, however it did carve out specific limited exceptions to the admission of hearsay evidence, in particular where a witness who provided evidence was unavailable for cross examination for some reason such as death or intimidation.¹⁴⁰ These exceptions were, themselves, subject to particular conditions or 'safeguards' which the British Courts had found countered the problems with the admission of hearsay evidence. Thus, the case before the court was whether the provisions of the CJA 2003 violated the right of a defendant to cross-examine witnesses in court enshrined in article 6 ECHR and whether they should 'read down' the statute¹⁴¹ to concord with Article 6 pursuant to s. 3 of the Human Rights Act 1998,

¹³⁶ *Costa v ENEL*, at 594.

¹³⁷ For more extensive overview of pluralist conceptions of the ECHR, see Krisch, *Open Architecture*.

¹³⁸ On the method and extent of incorporation of the ECHR into British law through the Human Rights Act, see generally, H. Fenwick, *Civil Liberties and Human Rights*, 4th ed., (Routledge: 2007), Chapter 4.

¹³⁹ Art. 6(1)(3)(d) ECHR.

¹⁴⁰ Contained in s. 116(1)(2)(a) Criminal Justice Act 2003.

¹⁴¹ On the practice of 'reading down' national law for conformity with the ECHR in the UK, see A. Kavanagh, *Constitutional Review under the UK Human Rights Act*, (CUP: 2009).

or issue a declaration that the provisions of the act which permit the use of hearsay evidence in trial was incompatible with the Convention under s. 4 HRA 1998.

What was particularly significant in this case, particularly from the viewpoint of pluralist conceptions of the ECHR, judicial dialogues and constitutionalism, was the obligation placed on the judiciary by s. 2 HRA 1998 to ‘take into account’ the case law of the ECtHR. It was a matter of settled law that the default position of UK courts was that they should follow ECtHR case in the absence of exceptional circumstances, a rule contained in Lord Bingham’s dictum in *Ullah* that: ‘[w]hile such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court [and that] it follows that a national court subject to a duty such as that imposed by section 2 [HRA] should not without strong reason dilute or weaken the effect of the Strasbourg case law. The duty of domestic courts is to keep pace with the Strasbourg jurisprudence as it evolves over time, no more but certainly no less.’¹⁴²

Thus, this statutory provision along with its authoritative interpretation facilitated the reception of ECtHR case law into the UK legal system as well as set the parameters of the relationship between British Courts and the ECtHR. The point was further complicated by the fact that the ECtHR, in its various chambers, had pronounced on several occasions on the compatibility of hearsay evidence from deceased or intimidated witnesses albeit that the case law was not entirely consistent.¹⁴³ However, what did seem to be emerging according to the UKSC’s review of the ECtHR’s case law was what it called the ‘sole and decisive test’.¹⁴⁴ This was most clearly formulated in the ECtHR’s decision of *Luca v. Italy* whereby the court found that:¹⁴⁵

“where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by article 6.”

Furthermore, to add another twist to the story, the ECtHR *already had an opportunity to adjudicate on the provisions on hearsay evidence of the CJA 2003* several months prior to the *Horncastle* decision in its *Al-Khawaja* decision.¹⁴⁶ This decision resulted in successful prosecutions which were based primarily on evidence introduced in court which was not subject to cross examination by the defendant pursuant to s. 116 CJA 2003. Reacting to claims that the admission of hearsay evidence was sufficiently counterbalanced by other safeguards contained in the Act, the Strasbourg court found that ‘in the absence of [...] special circumstances, the court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of

¹⁴² R (On the application of Ullah) v. Special Adjudicator [2004] 2 AC 323, para. 20.

¹⁴³ *Van Mechelen v. The Netherlands* (1997) 25 EHRR 647; *Luca v. Italy* (2001) 36 EHRR 807; *Doorson v. The Netherlands* 22 EHRR 330;

¹⁴⁴ *Horncastle*, para. 7.

¹⁴⁵ *Horncastle*, para. 40.

¹⁴⁶ *Al-Khawaja and Tahery v. United Kingdom* (2009) 49 EHRR 1.

an untested statement which was the sole or decisive basis for the conviction of an applicant.¹⁴⁷

In the event, the UKSC overtly disagreed with the ECtHR with respect to the requirements of fairness of criminal proceedings and the question regarding absent witnesses and counterbalancing factors. The Court reviewed the criminal trial procedure in England and Wales finding that the overarching system was designed to ensure the ‘fairness, impartiality and integrity’ of the process¹⁴⁸ which was expressed in a series of features of English criminal procedure including the presence of a jury to determine innocence or guilt as well as a number of other protections similar to those contained in Article 6. The Court opined that part of this fairness was the role of the judiciary as ‘gate keeper’ with regard to the admissibility of certain evidence to ensure that the procedure was not prejudiced, including the rule against hearsay. Whereas the rules on hearsay had been increasingly liberalised since the 1950s reflecting concerns that justice is done to the public through the effective prosecution of crime, safeguards had been included in the legislation to ensure that justice was also done to defendants in criminal trials.¹⁴⁹ These included a general ‘guillotine’ prohibition on evidence which ‘would have such an adverse effect on the fairness of the proceedings’ that a court should exclude it.¹⁵⁰ Other exceptions to the rule were the result of ‘experience accumulated over generations and represent[ed] the product of concentrated consideration by experts of how the balance should be struck between the many competing interests affected’.¹⁵¹ Thus, the structure and safeguards governing criminal trial proceedings which culminated in the CJA 2003 was a ‘crafted code intended to ensure that evidence is admitted only when it is fair that it should be’.¹⁵² In sum, as Lord Philips clearly recognised, what was at stake were rival conceptions of justice, or more specifically where the balance was to be struck between fairness to an accused and fairness to the public as part of the general conception of a fair trial.

In dismissing the appeals, and rejecting the ECtHR’s view of the compatibility of the CJA 2003 with Art. 6 ECHR, Lord Philips giving the unanimous judgment of the court, based the decision on a number of factors which speak to the resolutely pluralist nature of the decision entailing the ‘constitutional essentials’ of the domestic legal system. They included the fact that the common law had a longer pedigree of protecting defendant’s than the ECHR in terms of questions of hearsay, that parliament had deliberated extensively on the issue and come up with the CJA as a fair compromise; that criminal procedure on the European continent by reference to which the ECtHR developed its Art. 6 case law differed from that of common law systems which offered greater protection to defendants; that the ECtHR’s case law on

¹⁴⁷ *Horncastle*, para. 37. It should be noted that the UK government requested the referral of this decision to the Grand Chamber which was granted in March 2010. The proceedings were, however, stayed in order to await the UKSC’s decision in *Horncastle*. At the time of writing the appeal in *Al-Khawaja* is still pending before the Grand Chamber.

¹⁴⁸ *Horncastle*, para. 16.

¹⁴⁹ *Horncastle*, para. 64-66.

¹⁵⁰ s. 78(1) of the Police and Criminal Evidence 1984.

¹⁵¹ *Horncastle*, para. 10.

¹⁵² *Horncastle*, para. 36.

this issue was not completely clear and lacked authoritative guidance from the Grand Chamber and that the court's development of the case law in terms of the development of the 'sole and decisive rule' had not been properly reasoned; that such a rule would create havoc in English criminal procedure and that the *Al-Khawaja* decision did not establish that it was necessary to apply a sole and decisive rule in English criminal procedure.¹⁵³ Notwithstanding the failure by the UKSC to follow the ECtHR's apparently clear ruling in *Al-Khawaja*, what the Court did *not* reject was the conception of a fair trial itself nor the formulation of the concept contained in Article 6. Thus, Lord Philips concluded:¹⁵⁴

'I have decided that it would not be right for this court to hold that the [ECtHR's case law] should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that these provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general ... In so concluding I have taken careful account of the Strasbourg jurisprudence.'

Normative conflicts in Europe: Constitutional, pluralist both or neither?

What is clear from this snapshot of national judicial reactions to EU and ECHR law is that two distinct types of pluralism are at stake. With respect to the EU legal system, the nub of the conflict relates to sovereignty: 'in terms of the autonomy and primacy of EU law and the ECJ's judicial *Kompetenz-Kompetenz*. On the other hand, ECHR pluralism relates to the particular expression of abstract values such as the right to a fair trial and how best to articulate and balance these values with other considerations and interests. Therefore, it is submitted that, contrary to the orthodox view of pluralism in Europe, that it is actually pluralism with regard to the ECHR system which is *constitutional* whereas EU conflicts are of a more radical form and emphatically not constitutional. This is due to the fact that constitutionalism entails an elemental agreement which can be seen with respect to pluralism involving the ECHR but is lacking in respect of the EU. In order to substantiate this claim, a clear understanding of 'constitutionalism' is necessary, as well as an understanding of the domain of constitutional theory.

The domain of Constitutional Theory

As noted above, constitutionalism has become an increasingly popular method of accounting for, and providing a normative context to, transnational legal orders and their interaction and conflict with national legal orders. Whereas the EU is perhaps the 'locus classicus' of non-state constitutionalism, the notion has spread far and wide to cover various normative orders, legal systems and regulatory regimes up to and

¹⁵³ *Horncastle*, para. 14.

¹⁵⁴ *Horncastle*, para. 108, *Emphasis Added*.

include the United Nations and its system.¹⁵⁵ Thus, the concept of constitutionalism is enjoying a particularly fruitful period even if its domestic variant could be said to be in decline.¹⁵⁶

The adoption or importation of the constitutional ideal beyond the state is not one that is free from controversy.¹⁵⁷ Many have argued on various lines that the language of constitutionalism, in the absence of other aspects of the constitutional idea such as political community, legitimacy etc. mean that the notion does not make sense beyond the state container.¹⁵⁸ Others have argued that this expansion has resulted in a debasing of the conceptual currency of constitutionalism such that it means all things to all people and its way of accounting for or describing a particular normative configuration has been lost.¹⁵⁹ It is not my intention to engage with these debates here. Rather, for the purposes of the preceding discussion, it is worth examining what constitutionalism can mean if it does indeed have relevance beyond its statist setting with respect to the conflicts between national legal systems and the EU and ECHR systems; in normative conflicts in contemporary Europe, what is the domain of constitutional theory?

Notwithstanding divergences and disagreements about the particulars of constitutionalism, modern constitutional theory is framed by the twin pillars of what de Sieyès called the *pouvoir constituant* and the *pouvoir constitué*.¹⁶⁰ Thus, the various understandings of constitutionalism in terms of fundamental law, constitutional rights etc. all implicitly or explicitly entail or presuppose the twin concepts of legitimate origins and established order.

It is no exaggeration to claim, however, that the vast majority of constitutional theorizing in recent years, and particularly the types of theories which have dominated constitutional pluralist discourses in Europe, dwell almost exclusively on the nature, significance and meaning of the *pouvoir constitué*, that is the order which is constituted by the constituting power, and less about the form or nature of the constituting power.¹⁶¹ Contemporary constitutionalism is dominated by theorizing the dimensions of the *pouvoir constitué* by adopting meta-ethical approaches to the establishment of constitutional values such as the ‘veil of ignorance’ or an

¹⁵⁵ P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?*, (Oxford: OUP, 2010); J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, (Cambridge, CUP, 2009) and J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, (Oxford: OUP, 2009).

¹⁵⁶ For examples of this argument, see D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’ and M. Loughlin, ‘What is Constitutionalisation?’ in Dobner and Loughlin, *The Twilight of Constitutionalism?*.

¹⁵⁷ Dobner and Loughlin, *The Twilight of Constitutionalism?*.

¹⁵⁸ D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’ and M. Loughlin, ‘What is Constitutionalisation?’ in Dobner and Loughlin, *The Twilight of Constitutionalism?*.

¹⁵⁹ N. Walker, *The idea of Constitutional Pluralism*.

¹⁶⁰ See M. Loughlin, ‘The Domain of Constitutional Theory’ (2005) 25(2) *Oxford Journal of Legal Studies*, 183-202, at 188.

¹⁶¹ A notable exception to this general trend is M. Loughlin and N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: 2006).

‘overlapping consensus’;¹⁶² a conception of law as integrity which coheres with higher order constitutional values of equality,¹⁶³ constitutional provisions, particularly rights provisions, as ‘incompletely theorized agreements’ requiring further definition and interpretation¹⁶⁴ or in terms of models of balancing between conceptions of the right and the good.¹⁶⁵

What contemporary constitutional theory is *not about*,¹⁶⁶ it is argued, is the meta-question of the limits of those who engage in the process of deliberation, adjudication etc.; that is the identification of those who get to decide who decides; who is and is not legitimately part of the political community which will then step behind the veil of ignorance, get at seat at the discussion table or become a signatory or ‘founding father’. These questions of constituent power are *presupposed* rather than *addressed* by contemporary constitutional theory.

Moreover, such questions of inclusion and exclusion cannot be determined by the constituted order as it leads to an infinite regress. This is because from the internal viewpoint of the constituted order, the constituent power or the constitutive act which founds constitutional order is, itself, unconstitutional. This paradox was articulated perhaps most clearly by Hannah Arendt in her study of the first two modern revolutions finding that:¹⁶⁷

‘... those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve. The vicious circle in legislating is present not in ordinary lawmaking, but in laying down the fundamental law, the law of the land or the constitution, which from then on, is supposed to incarnate the ‘higher law’ from which all laws ultimately derive their authorship.’

This ‘vicious circle’ is also present in normative constitutional theory, particularly in the work of Hans Kelsen, where the constitution *qua* constituted order cannot internalize the act of its own constitution. Kelsen’s solution to plug the infinite regress was to postulate the basic norm presupposed in relation to the normative order.¹⁶⁸ Thus, constitutionalism’s solution to the unauthorized origins of constituted power then is to describe this situation *ex post* such that ‘an act of constituent power gives rise to a legal order only *retroactively* – that is when it is viewed as an act of

¹⁶² Rawls, *Overlapping Consensus*, above. The extent to which the theory of Justice can be considered a work of constitutional theory is disputed by Loughlin, *Domain* (2005). Political liberalism, on the other hand, after the ‘political not metaphysical’ debate, is more squarely within the register of constitutional theory.

¹⁶³ R. Dworkin, *Law’s Empire*.

¹⁶⁴ Sunstein, *Incompletely Theorized Agreements*.

¹⁶⁵ See R. Alexy, *A Theory of Constitutional Rights*, (OUP, 2002).

¹⁶⁶ Or at least the models relied upon in the constitutional pluralist literature.

¹⁶⁷ H. Arendt, *On Revolution*, (Harmondsworth, Mx and New York: Penguin Books, 1963), 183-4.

¹⁶⁸ See H. Kelsen, *General Theory of Law and State* (HUP: 1945).

constituted power'.¹⁶⁹ In the founding of constitutional order, the constituted power necessarily 'excludes that a We says "we"'.¹⁷⁰

In post-state constitutionalism, this problem of the infinite regress and 'formless forming'¹⁷¹ of constitutional order takes the form of with what Prandini has called the 'problem of the polity'.¹⁷² Like the problem of constituent power, this problem of the polity is 'connected with the arbitrariness of power',¹⁷³ which constitutional theory presupposes rather than establishes or justifies.¹⁷⁴ The arbitrary process of inclusion and exclusion which affects domestic constitutionalism translates into an arbitrary privileging of one of the two levels involved in the conflict; national and supranational.

Thus, constitutionalism lacks the resources to engage with the problem of the polity, as it is an expression of constitutionalism's inherent paradox; the fact that constituted order cannot account for its own constitution. It lacks the resources to resolve this question beyond an abstract reference to an *ex post* naming of the constituent power as such. Rather, the question of the origins of constituent power is something *extra constitutional* and beyond the bounds of constitutional theory. What all this means is that constitutionalism cannot act a device for arbitrating between rival claims to ultimate authority, cannot favour the postulating of one *Grundnorm* over another. All it can do is describe the situation from the *ex post* constituted power's viewpoint which is *ipso facto* tendentious.¹⁷⁵

If, the functions and perhaps more importantly, limitations of constitutionalism and constitutional theory are as I have outlined then this clearly has important implications for pluralist discourse in conflicting normative orders in Europe. As the Lisbon judgment clearly illustrates, the conflicts between EU law and national law relate to disputes about *Kompetenz-Kompetenz*; that is the question of ultimate interpretative authority. This is simultaneously claimed by the ECJ as well as national courts; rival supremacies of their respective orders.

As such, the dispute is not one susceptible to constitutional compromise because it is, by its nature, zero-sum. The notion of *ultimate* authority entails non-heteronomy and rival claims to this status are *incommensurate*. These conflicts and therefore EU constitutional pluralism lack the elemental *agreement* presupposed by contemporary constitutional theory precisely because the foundation of agreement, the ultimate legal authority, is disputed. This is the essence of pluralist conceptions of EU law as articulated by MacCormick at the outset in his account of radical pluralism.

¹⁶⁹ H. Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Loughlin and Walker, *Paradox*, p. 19. *Emphasis added*.

¹⁷⁰ H. Lindahl, 'Acquiring a Community: The *Acquis* and the Institution of European Legal Order' (2003) 9(4) *European Law Journal*, 433-450.

¹⁷¹ C. Schmitt, *Verfassungslehre* (Duncker & Humbolt: 1993 [1928]) cited in Lindahl, *Acquiring a community*, FN 30.

¹⁷² R. Prandini, 'The Morphogenesis of Constitutionalism' in Dobner and Loughlin, *Twilight*, p. 320.

¹⁷³ *Ibid.*

¹⁷⁴ To get to close to the origins of constituted order is, as Kelsen remarked, to be confronted by "the gaping stare of the *Gorgon's naked power*". H. Kelsen, *Aussprache: Veröffentlicht der Vereinigung der Deutschen Staatsrechtslehrer*, (1927) cited in S. Delacroix, 'Schmitt's Critique of Kelsenian Normativism' (2005) 18(1) *Ratio Juris* 30-45.

¹⁷⁵ For an excellent illustration of this point, see C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1998) 16(4) *Law and Philosophy*, 377-420.

It is an incorrigible fact that legal systems can only look to their own originating or constitutive rules as *authoritative*, that is as the ultimate resource and guide for normative conflict.¹⁷⁶

As such, then, *pace* the metaconstitutionalist, EU legal conflicts are precisely about a ‘clash of absolutes that necessarily leads either the adoption of ECS or NCS’¹⁷⁷ which cannot be resolved pursuant to an overarching ‘metaconstitution’. To postulate a ‘metaconstitutional’ frame to manage which rival claims based on principles of constitutionalism beyond the state, incompletely theorized agreements or an ‘overlapping consensus’ is simply to beg the question, given that there is no starting point; no common ground, on the question of ultimate authority which could found that basis of such a metaconstitution.

Where a metaconstitution can have a role in normative conflicts is where legal systems share the same values and diverge as to their precise meaning and interpretation. This is the case with ECHR conflicts, it is submitted, which are not about the ultimate rule of recognition, or ‘top rule’ *per se* but rather relate to *differing interpretations of common values*. ECHR conflicts such as that in *Horncastle* are not questions of sovereignty or *Kompetenz-Kompetenz*, but rather the interpretation and expression of *common values* which form the foundation of an ECHR constitutionalism in terms of a thick *agreement* on the rights contained in the Convention by the legal systems of its signatory states. What the ECHR pluralism entails, then, is the Neumann has called the ‘suprapositive’¹⁷⁸ values of human rights norms establishing a putative European metaconstitutionalism. It is *these suprapositive values which provide the basis of constitutional agreement* whether expressed in terms of an overlapping consensus, an incompletely theorised agreement or the principles of political morality which underpin the national and ECHR legal systems. Similar to MacCormick’s conception of pluralism under international law, then, ECHR constitutional pluralism posits the hierarchy of the suprapositive values embedded in the ECHR itself which adjudicate and regulate the relationship between the two legal orders. The two legal systems, then, are in a heterarchical relationship with respect to each other.¹⁷⁹ The values of the overarching metaconstitution of the ECHR opens up a space for dialogue between national courts and the ECtHR in cases of conflict, as co-interpreters of the values, working together to ensure the protection and preservation of these values in their legal systems. In this way, Lord Philips’ concluding gambit to the ECtHR in the *Horncastle* decision, is a metaconstitutionalist move *par excellence*, where he stated that “*I hope that in due course the Strasbourg court may also take account of the reasons that have led me not to apply the [ECHR’s*

¹⁷⁶ Elsewhere, I have argued that the difference between MacCormick and Kumm’s approach to constitutional conflict and constitutional pluralism is based on their differing conceptions of legal ontology, MacCormick adopting legal positivist and Kumm adopting a non-positivist, Dworkinian conception of law. See C. Mac Amhlaigh, ‘Concepts of Law in Integration Through Law’ in D. Augenstein (ed.), *Integration Through Law Revisited: The making of a European Polity*, (Ashgate, 2011) (*forthcoming*). However, this is an issue I cannot explore here.

¹⁷⁷ Kumm, *Jurisprudence*, 290.

¹⁷⁸ G. Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55(5) *Stanford Law Review*, 1863-1900.

¹⁷⁹ MacCormick, *Risking Constitutional Conflicts*.

test] in this case”.¹⁸⁰ Thus, the space is opening up for dialogue with respect to the meanings and interpretations of the suprapositive values of the ECHR metaconstitution where

the courts work with each other to ensure the protection of the right to a fair trial but showing deference and accommodation where national considerations must be taken into account.¹⁸¹

Resetting the terms of the debate: An alternative Tale of Two Pluralisms.

Thus, contrary to the orthodox position in the literature on legal pluralism in Europe, ECHR pluralism is genuinely constitutional pluralist, whereas conflicts between EU and national law are not, they relate more to the are more genuinely pluralist in the sense of MacCormick’s ‘radical’¹⁸² or Krisch’s ‘systemic’¹⁸³ pluralism. The contours of a dialogic metaconstitutional frame, as elaborated in Kumm’s constitutionalism beyond the state, Maduro’s contrapuntal law or Sabel and Gerstenberg’s co-ordinate constitutionalism are therefore more appropriate in respect of the ECHR/national law relationship than that of national law and EU law. This has already been considered at length and I have nothing to add to it here. Rather, the form of pluralism between EU law and national law merits closer attention.

The challenge for an account of pluralism beyond the constitutional mould in the relationship between EU law and national law is to account for the *viscosity* of EU and national law in the absence of an overarching normative framework and which accounts for the specificity of EU law, and in particular its deep penetration in national legal orders which is not shared by other non-state orders.¹⁸⁴ That is, what is the nature of the relationship between national law and EU law if it is not constitutional, and if national courts insist upon the ultimate authority of their constitutions, with simultaneous claims from the ECJ?

As noted above, MacCormick first postulated legal pluralism in Europe in terms of radical pluralism, where legal systems interacted in an unprincipled way. In developing his own account of pluralism in postnational law, Krisch survey’s the notion of systemic pluralist in legal theory finding that it occupies a space between a reactionary dualism of traditional public international law and the ‘thick’ bonds of

¹⁸⁰ *Horncastle*, para. 108, emphasis added.

¹⁸¹ Moreover, the nature of ECHR constitutional pluralism, it is submitted, does not entail the margin of appreciation, so beloved of legal pluralists everywhere. This is because the margin of appreciation is an *intra-systemic* phenomenon whereas pluralism is necessarily inter-systemic. Since the inception of the doctrine, the ECHR has argued that the margin of appreciation is part of the Convention system itself, allowing deference to the signatory states in the implementation of the rights contained in the convention. Pluralism, by contrast, as MacCormick clearly shows, is inter-system, that is between systems rather than within one system. It relates to the contestation of the interpretation itself, not whether interpretation is unilaterally deferred by the ECHR. In this regard, pluralism relates to the assertion of one’s interpretative authority outwith the system as opposed to within the system. Legal pluralism, and in particular pluralist conflicts, relate to regime collision, where rival sites claim that their interpretation of common values is more appropriate or superior in defiance of the claims of the other site.

¹⁸² MacCormick, *Sovereignty now*.

¹⁸³ Krisch, *Case for Pluralism*.

¹⁸⁴ Including, it must be added, the metaconstitutional ECHR.

post-state constitutionalism which can be useful in order to establish the nature of pluralism in EU legal conflicts.¹⁸⁵

Perhaps the most radical form of legal pluralism identified by Krisch are the sociological approach of Teubner and Fischer-Lesacano¹⁸⁶ where pluralism is simply the necessary result of extreme societal differentiation, which has been applied specifically in the EU context by Maher.¹⁸⁷ This is the sociological equivalent of MacCormick's 'radical pluralism' rendered even more radical by the opening up of a plurality of vistas beyond the pluralisms of international normative orders.¹⁸⁸ However, following Koskeniemi, Krisch finds that such pluralism 'ceases to pose demands on the world.'¹⁸⁹ Moreover, in the EU context in particular, this 'radical' radical pluralism fails to account for the particularity of EU law vis-à-vis other post-state legal orders and in particular the depth of penetration of the norms of EU law in national legal and constitutional practices. Krisch also looks at the normative virtues of pluralism in terms of 'checks and balances' between legal systems which is close to Sabel and Gerstenberg's co-ordinate constitutionalism and Maduro's contrapunctual law. However, this harks back to a form of constitutionalism which cannot overcome the problem of the polity. Even if we bracket the thicker elements of Maduro's contrapunctual law (particularly its constitutional-style incompletely theorised agreements) and accept the normative thrust of mutual monitoring implicit in the checks and balances conception of the nature of the interaction between the orders, there is a sense in which this presupposes an overarching (constitutionalist) frame within which such checks and balances take place. It is no coincidence that checks and balances are the lynchpin of separation of powers constitutional and federal theories, however it is precisely this overarching frame which is explicitly repudiated in the polity-centred *Kompetenz-Kompetenz* claims of national constitutional courts as illustrated in the BVG's Lisbon judgment.

Another alternative way of managing pluralism between the EU and national legal orders which appears in Krisch's survey, is Weiler's looser form of pluralism predicated on a 'constitutional tolerance',¹⁹⁰ where the systems are 'invited' rather than 'told' to obey the constitutional orders or principles in order to avoid 'mutually assured destruction'.¹⁹¹ However, from the viewpoint of EU legal conflicts, it is submitted that this is also problematic. First of all, from an empirical viewpoint, it does not seem that the invitation to obey is reconcilable with the aggressive assertion of autonomy by national courts in cases of conflict which was evidenced in the BVG's Lisbon judgment. The assertion of national constitutional primacy seems more defensive and unilateral than consensual, which is a hallmark of the ideal of

¹⁸⁵ Krisch, *Case for Pluralism*, 19-34.

¹⁸⁶ For discussion see Krisch, *Case for Pluralism*, 18-19. On Teubner's account of societal constitutionalism more generally see G. Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State' in Dobner and Loughlin, *Twilight*.

¹⁸⁷ I. Maher, 'Community Law in the National Legal Order: A Systems Analysis' (1998) 36(2) *Journal of Common Market Studies*, 237.

¹⁸⁸ MacCormick, *Questioning Sovereignty*, Ch. 1.

¹⁸⁹ Krisch, *Case for Pluralism*: 18, citing M. Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 23.

¹⁹⁰ J. H. H. Weiler, 'In defence of the status quo: Europe's constitutional *Sonderweg*' in Weiler and Wind, *European Constitutionalism*

¹⁹¹ Weiler, *Constitution of Europe*.

constitutional tolerance.¹⁹² Moreover, and perhaps more importantly, the principle of constitutional tolerance does tend towards a sort of ‘constitutional’ monism in the form of a higher, if not quite norm, then principle or idea which both undermines its genuinely pluralist credentials. Furthermore, constitutional tolerance, fails to distinguish the peculiarities of the EU legal order from other post-state normative orders which states are ‘invited’ to obey but frequently and often do not.

Finally, Krisch’s own suggestion of a ‘complex and fluid’ postnational order’ constitutionally subject to readjustment and challenge¹⁹³ faces a similar twofold challenge.¹⁹⁴ Firstly, it fails to capture the specificity of the EU as a form of postnational law and political organisation, but again, perhaps more importantly it seems to stretch the notion of ‘order’ to breaking point.¹⁹⁵ It seems that such pluralism is a polite form of chaos, and, from a juristic point of view, a blatant violation of the rule of law with knock-on effects on the legitimacy of the judiciary and their interpretation and application of post-national norms. It tends towards an explicit endorsement of ‘billiard ball’ politics with little in the way of normative guidance as to how and when post-national norms do or should apply in national jurisdictions nor does it account for the viscosity between EU and national law.¹⁹⁶ This therefore somewhat undermines the claim that pluralism is something other than traditional international law dualism.

It may be that our normative vocabulary is lacking with respect to the nature of the relationship and conflicts between national law and EU law; resulting in a recourse to the hackneyed (and meaningless) *sui generis* label.

I think, perhaps, however that constitutionalism, in its hierarchical form may still be the best way to conceptualise the relationship between EU and national law, and that, perhaps, many constitutional pluralists might tacitly agree. This does not mean burying one’s head in the sand when the German Constitutional Court fires its next ‘shot over the bow’,¹⁹⁷ but rather accepting such recalcitrance and conflict as part and parcel of *any* hierarchical constitutional order. This is similar to Baquero-Cruz’s characterisation of EU conflicts in terms of ‘institutional disobedience’¹⁹⁸, drawing on

¹⁹² Although, not, with respect to the ECHR as the Supreme Court in *Horncastle* clearly showed.

¹⁹³ Krisch, *Case for Pluralism*, 39.

¹⁹⁴ It should be noted that Krisch is not specifically concerned with EU legal conflicts.

¹⁹⁵ Krisch is not unaware of this challenge and he does make an attempt to address them. However, he address the challenges by pointing out that constitutionalism fails to provide a more promising alternative in the absence of sufficient structural and cultural supports at the postnational level. However, notwithstanding the problems with constitutionalism as a form of organization, this *tu quoque* response does address the questions of fragmentation, legality and coherence which infect his pluralist ideal. Krisch, *Case for Pluralism*, 41.

¹⁹⁶ This is confirmed by his rejection of ‘integrity’ as a form of legality as the prime value in society, arguing that democracy is also relevant. Moreover, finding refuge in deliberative forms of democracy belies the need for an overarching structure under which deliberation and contestation can take place. For discussion see C. Mac Amhlaigh, ‘The European Union’s constitutional mosaic: Big ‘C’ or small ‘c’; is that the question?’ in N. Walker, J. Shaw and S. Tierney (eds.), *Europe’s Constitutional Mosaic*, (Oxford: Hart, 2011), particularly pp. 30–38.

¹⁹⁷ G. de Búrca, ‘Sovereignty and the Supremacy Doctrine of the European Court of Justice’ in N. Walker (ed), *Sovereignty in Transition*, above, p. 455.

¹⁹⁸ J. Baquero Cruz, ‘An Area of Darkness: Three Conceptions of the Relationship between European Union law and State Constitutional Law’ in N. Walker, J. Shaw and S. Tierney (eds.), *Europe’s Constitutional Mosaic*.

the Rawlsian tradition of civil disobedience in terms of ‘a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government’.¹⁹⁹ There are a number of demands on institutional disobedience, particularly as a last resort in the framework of otherwise generally just and well-functioning systems. As such institutional disobedience can actually have positive effects on the hierarchical constitutional systems more generally as a ‘stabilising device’ or ‘escape valve’²⁰⁰ for the system as a whole. An example of the positive externalities of institutional disobedience is the development of a fundamental rights case law by the ECJ where the German courts threatened institutional disobedience if EU law violated the provisions of the German Bill of Rights. This had a positive effect of the EU’s (hierarchical) constitutional order and ultimately culminated in the drafting of Charter of Fundamental Rights of the EU.²⁰¹ Similarly, the threatened institutional disobedience by the German courts again in Maastricht and Lisbon can be said to have had a positive effect on the ECJ’s controlling of the legislative competences of the EU institutions, both with respect to the EU’s lack of competence to accede to the ECHR²⁰² and leading to the first case of an EU law being struck down by the ECJ on grounds of exceeding their competences under the treaty.²⁰³

However, it is important to distinguish the conditions surrounding institutional disobedience from crystallising into yet another set of principles or criteria for resolving conflicts between EU and national law, which invariably take on hierarchical ‘metaconstitutional’ tendencies.²⁰⁴ Civil disobedience is just that, disobedience; a conscious decision to defy the law and as such it cannot by definition be governed by the law. It is a fact of life that not everybody obeys the law all the time, and this applies as much to institutions as to individuals. In this regard, we should embrace the occasional recalcitrance and rebellion as part of any hierarchical and constitutional relationship and as a healthy part of the political and constitutional landscape in Europe.

Conclusion

The proliferation of normative orders coming into conflict is an increasingly common part of our legal universe. The era of a simplistic dualism between international and national or constitutional law, where the normative orders were contained in hermetically sealed sovereignty states is passing. The lid on that

¹⁹⁹ John Rawls, *A Theory of Justice*, reproduced in Hugo A Bedau (ed), *Civil Disobedience in Focus* (London and New York, Routledge, 1991) 104. For the definition, Rawls relies on Hugo A Bedau, ‘On Civil Disobedience’ (1961) *Journal of Philosophy*, 1961, 653.

²⁰⁰ Baquero Cruz, *An Area of Darkness*, 16.

²⁰¹ O. J. C 83 30.03.2010.

²⁰² Opinion 2/94 [1996] ECR I-1759.

²⁰³ Case C-376/98, *Germany v. Council* [2000] ECR I-8419. See also, Baquero-Cruz, *Legacy*, p. 404.

²⁰⁴ For example both Kumm and, particularly Sabel and Gerstenberg endorse the *Solange* case law of the BVG as part of their characterization of the normative principles underpinning the relationship between national and EU legal systems. However, they do so by adopting a metaconstitutional approach which is repudiated here. Disappointingly, Baquero Cruz himself ultimately opts for a similar type of ‘metaconstitutional’ model of institutional disobedience along the lines of Kumm. See Baquero-Cruz, *Area of Darkness*, pp. 17-20.

Pandora's box has well and truly been lifted, not least in Europe which is experiencing perhaps the most intense form of pluralism of normative orders. The EU and ECHR in particular, challenge the orthodox Westphalian picture on legal systems and their interaction. The constitutional claims made by these sites introduce a vertical competition for the symbolic prize of constitutionalism as ultimate authority; something which had been hitherto fought purely vertically between the rival constitutional systems of sovereign states. It is natural for lawyers to be attracted to disruptions in the working order of these systems, particularly when they come into conflict, and attempt to provide a principled normative solution to social conflict. Indeed, this is what law does.

Thus, the development of pluralism and subsequently constitutional pluralism as a way of managing and resolving conflicts between national and post-state legal orders is both understandable and necessary. However, as this paper has attempted to demonstrate, the way in which constitutionalism has been employed in these conflicts specifically is erroneous. It is the lesser analysed relationship between national law and the ECHR which is truly constitutional pluralist given that it entails a common point of reference, a constitutive agreement on the suprapositive values which inform the ECHR itself. This is constitutionalism in its classic form and disagreements emerged as to the nature and requirements of, rather than the existence and articulation of the values themselves. With regard to the EU, the conflicts are less constitutional and may be more pluralist. The existential conflicts regarding ultimate authority which form the basis of EU pluralism are not something which is amenable to constitutional resolution. They reflect the stuff of sovereignty; the unauthorised origins of power and as such cannot be managed by an *ex post* constituted power, whether through metaconstitutional principles or otherwise.

The concerns regarding pluralism and particularly the rule of law and the role of courts in settling systemic conflicts is warranted and recent reactions and vilifications of courts, particularly supranational courts,²⁰⁵ is a reminder that Courts are as vulnerable as any branch of government to the vicissitudes of public opinion. That courts uphold the rule of law is central to their legitimacy and the drive to constitutionalise normative conflicts is part of this ideal. With regard to the ECHR, courts can claim that they are upholding the values of the ECHR while disagreeing with the ECHR's interpretation thereof. With regard to EU normative conflicts on the other hand, the upholding of the rule of law entails upholding the rule of EU law. This will not always be perfect nor possible but where institutional disobedience is warranted, the resulting compromise should be viewed for what it is; as the normal development and evolution of any (hierarchical) constitutional system.

²⁰⁵ In the EU context, see the controversial cases of Case C-438/05, *Viking*, 11 December 2007, Case C-341/05, *Laval*, 18 December 2007, on the free movement of labour and collective bargaining agreements and the controversial stance taken by the ECtHR on prisoner voting rights in *Hirst v. UK* (No 2) (2006) 42 EHRR 41.

